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 FEDERAL COMMUNICATIONS COMMISSION
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December 1, 1997

BY HAND DELIVERY

Magalie Salas, Esquire
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 Washington, DC 20554

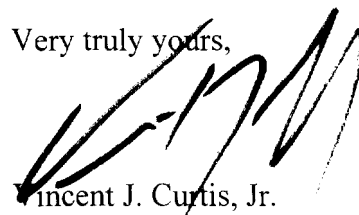
Re: MM Docket No. 97-182

Dear Ms. Salas:

Transmitted herewith on behalf of The WB Television Network are an original and four copies of its "Reply Comments" in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate with this office.

Very truly yours,



Vincent J. Curtis, Jr.
 Counsel for The WB Television Network

VJC:mah
 Enclosure

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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DEC 1 - 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Preemption of State and Local Zoning and)
Land Use Restrictions on the Siting,)
Placement and Construction of Broadcast)
Station Transmission Facilities)

MM Docket No. 97-182

To: The Commission

**REPLY COMMENTS
OF
THE WB TELEVISION NETWORK**

Comes now the WB Television Network¹ ("The WB"), through counsel, and respectfully submits its Reply Comments in the above-captioned proceeding. In support thereof, the following is stated:

1. In issuing its Notice of Proposed Rule Making (NPRM), FCC 97-296, Released August 19, 1997, instituting this proceeding, the Commission not only recognized the obvious benefits to be achieved by a uniform national procedure for tower siting, particularly in those areas of existing federal expertise (NPRM at ¶ 7), but also the need to be sensitive to the role of state and local government in zoning and land use issues (Id at ¶ 15). The WB joins those commenters to date that support the efforts of the Commission to balance the role of federal and state objectives, while avoiding the continuing history of extraordinary delays and uneven decisions by local authorities,

¹The WB is an emerging national television network, which relies upon its primary and secondary affiliates to reach sufficient nationwide coverage. See Generally, Reply Comments The WB Telecommunications Network, filed October 14, 1997 in ET Docket 97-157 (Relocation of television channels 60-69).

which not only could spell death to rapid DTV roll out, but severely hamper the day-to-day operation of new or modified analog facilities. As a new and growing national network,² the goals of the Commission to create reasonable timetables for the airing of local zoning and land use issues are important steps in allowing the WB and its affiliates to increase audience share. Delay in reaching new audiences, not head-to-head competition with its competitors, is currently the biggest nemesis of The WB.

2. Extraordinary delay³ and disingenuous enforcement policies⁴ ring though the Comments of supporters of the Commission's proposal. Numerous examples of erratic and inconsistent action and long drawn-out administrative and judicial cases as well as local statutes with goals of impeding broadcast facility construction at any cost, are copiously listed throughout the

²The Commission long has recognized the public interest benefits to be received by increased network competition, and has encouraged and fostered its growth. See Report on Chain Broadcasting, Commission Order No. 37, Docket 5060 (May 1941) at 88 ("Report on Chain Broadcasting"); Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting, 25 FCC 2d 318, 333 (1970) ("Competition and Responsibility in Network Television Broadcasting"); Fox Broadcasting Co. Request for Temporary Waiver of Certain Provisions of 47 C.F.R. § 73.658, 5 FCC Rcd 3211, 3211 and n.9 (1990) ("Fox Broadcasting"), (citing Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation (Vol. 1 Oct. 1980)), waiver extended, 6 FCC Rcd 2622 (1991). Review of the Commission's Regulations Government Programming Practices of Broadcast Television and Affiliates, 47 C.F.R. § 73.658(a), (b), (d), (e) and (g), 10 FCC Rcd 11951, 11955 (1995) ("Network/Affiliate NPRM").

³See Comments of the National Association of Broadcasters (NAB) and the Association for Maximum Service Telecommunications (MST); Comments of the California Broadcasters Association, et al; Comments of the Association of Local Telecommunications Stations.

⁴Comments of the Association of American Public Telecommunications Stations and The Public Broadcasting Services.

comments filed.⁵ Thus, contrary to the opposition comments of the National League of Cities, et al, the problems broadcasters face today are not the “few” anecdotal examples that the original petitioners⁶ provided to the Commission, but are truly wide spread and of enormous consequence throughout the country.⁷

3. Those opposing the Commission’s efforts range from the truly concerned comments of local governmental agencies that raise such questions as the necessity of applying proper notice requirements under state and local laws,⁸ to misunderstandings as to the proposed rules relative to safety issues⁹ and health concerns¹⁰ to an “in your face” challenge by the National League of Cities to conduct a protracted legal battle in the courts, if the Commission goes forward with its proposed

⁵See, e.g., Comments of the Alabama Broadcast Association; Comments of Fant Broadcasting Co.; Comments of Harry J. Pappas, et al. See also the examples attached hereto dealing with El Paso, Texas and Norman, OK (See Attachment A). Even the Public Television stations have suffered at the hands of unreasonable local bias. See, Comments of Association of America’s Public Television Stations and the Public Broadcasting Service.

⁶This proceeding resulted from the “Petition for Further Notice of Proposed Rule Making” filed jointly by the NAB and MST.

⁷The National League’s contention that the “few” examples compared to the vast number of Broadcast towers throughout the country show there is no serious problem (in addition to being factually wrong), ignores the fact that the bulk of broadcast towers throughout the United States were built more than twenty years ago - before the advent of the increased land use restrictions today’s new towers will face. When it is recognized that some 1000 or more towers will be involved with the DTV roll out plan, it is obvious that a serious situation exists and needs an answer now.

⁸See Comments of The Virginia Association of Counties; Comments of the State of Massachusetts.

⁹See, e.g., Comments of the National Business Aviation Association, Air Transport Association of America, National Association of State Aviation Officials.

¹⁰See, Comments of The Cellular Phone Task Force.

rules.¹¹ While it seems inevitable that efforts to convince entrenched parties such as the National League of Cities will fall on deaf ears, it does seem possible that changes in the proposed rules regarding timing concerns evinced by state and local government is possible.¹² If anything, the Commission's NPRM sought such opportunities Id at ¶¶ 18, 21, 22 and 24.

4. The WB fully supports the Comments proposed to preempt those areas that have demonstrated federal expertise. NPRM and Appendix B. There is more than ample precedent demonstrating Commission authority to preempt state and local authorities in such areas as radio frequency interference,¹³ as well as restrictions dealing in health effects of RF emissions, tower lighting, etc.¹⁴ By codifying this expertise in the form of a preemptive right, the FCC will eliminate the ability of those seeking to irrationally¹⁵ delay tower construction by employing these issues as offensive tools of delay.

¹¹In the case of the various aviation interests, it is submitted that these comments ignore the fact that the Commission recognizes real safety factors as a clear and continuing concern of state and local authorities. See NPRM at ¶ 15.

¹²For example, as to the notice to the public concerns raised in Comments by the Association of Virginia Counties, perhaps a requirement that the proponent of the zoning/land use change be required to place a notice in the local or regional newspaper would be helpful. This would place both the cost and obligations on the proponent and perhaps remove some of the constraint felt by local authorities.

¹³See, e.g., 47 USC §§ 152(a), 301, 303(c), (d), (e) and (f); Head v New Mexico Board of Examiners in Optometry, 374 US 424, 430 (1963).

¹⁴See, Hines v. Davidowitz, 312 US 52, 58 (1941), City of New York v. FCC, 486 US 57, 63 (1986).

¹⁵More than one commenter noted that the local zoning/land use boards are most often faced with angry neighbors whose real issue is NIMBY (not in my back yard) and who raise totally frivolous health and environmental issues.

5. By far, the biggest and most often cited complaint put forth by commentators supporting the Commission deals with inordinate delays at the state and local level. Contrary to the shrill protest of the National League of Cities, federal agencies, in particular, the FCC have preempted local zoning authorities when it has been shown that local activity was set to hinder progress.¹⁶ To fail to prevent the types of delays that have been submitted as examples in this proceeding and which would clearly disrupt the roll out of DTV would be inconceivable and a waste of the years of work that has gone into this effort.¹⁷ Moreover, it is most important that the new rules be applied to the analog facilities that must continue to compete in the day-to-day business of broadcasting. The Commission cannot ignore the fact that these new or modified facilities are used in the DTV plan as an integral element of allocation. See, Comments of the Association of Local Television Stations Inc.

CONCLUSION

While the WB recognizes that there may be a need to tinker with the exact time tables that have been proposed, the Commission's proposal recognizes the reality of today - not of a past time where the great majority of broadcast stations were built - and the havoc to both analog improvement and DTV roll out that unchecked delay and disruption can cause. The rules proposed are reasonable

¹⁶See, e.g., Preemption of Local zoning Regulation of Satellite Earth Stations, 11 FCC Rcd 5809 (1996); Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, 101 FCC Rcd 952 (1985).

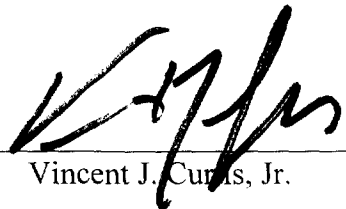
¹⁷Not only is there a real threat to commercial broadcasters but it is anticipated that if such delays are permitted to continue the effect on public television would be disastrous. See, Comments of America's Public Television Stations and the Public Broadcasting Service.

under the circumstances and seek to achieve a federal objective with limited intrusion to the States and local government.

Accordingly, it is respectfully requested that the Commission adopt rules looking toward the preemption of local and state activities that are clearly matters of federal expertise. The Commission should set time tables and procedures that are compatible with the needs of state and local governments, but which provide for the elimination of unnecessary and extraordinary delay.

Respectfully submitted,

THE WB TELEVISION NETWORK

By: 

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Its Counsel

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Date: December 1, 1997

Examples of Tower siting problems

El Paso, TX Channel 38 and Channel 65

The city council enacted an ordinance supposedly to limit mountain development for buildings and roads in the higher elevations of El Paso to supposedly preserve the scenic beauty of the mountains. Actually the act requires wider roads, more gently sloped, with wider incursions into the mountain slopes and only more expensive highly visible houses at the higher elevations. This ordinance did not address existing communications facilities on top of Mount Franklin but was subsequently applied to any further development, expansion, or modification of communications facilities. Also, any permits requested are referred, after normal processing (which takes months), to a mountain committee made up of citizens of El Paso. If it were an ordinary building or structure it would be referred back to the zoning board of adjustment with a recommendation that a variance be granted and then a construction permit could be issued. The entire process consumes typically six to eight months. However, in the case of a tower or communications facility, any modification after review by the citizens' committee and after being sent back to the zoning board of adjustment is then scheduled for a hearing by the entire city council in order to grant a special use permit. Besides taking months to get on the calendar, it must be heard twice by the city council at regularly scheduled meetings of thirty days or more apart and notices sent out to all wishing to object to come to those meetings. If the council then approves the special use permit, it is sent back to the zoning board of adjustment and eventually a building permit can be attained, the total process taking over a year, sometimes two. Such was the experience of both educational channel 38 and commercial channel 65 and missionary radio evangelism, where channel 65 and 38 are located.

Norman, Oklahoma Channel 30 and Channel 46

Well after the filing of construction permits for a taller tower at the site of channel 46 Norman, Oklahoma in rural farm land, not normally within city limits, but in the case of Norman, most of, if not all, of the county is in the city limits, the city council of Norman enacted an ordinance designed to restrict the proliferation of cellular and PCS type towers, restricting them to mono-pole construction under 200 feet without tower lights and a building size of 120 sq. feet maximum. Within months of receiving a construction permit, the zoning commission was approached for permits to replace the existing 199 foot tower and a 950 foot tower to house channel 30 and channel 46. They informed us that because of this new ordinance, our tower was prohibited and there was nothing that we could do about it. We then scheduled a meeting with city council for about two months later, and which time we were told that we would have five minutes to present our request. The council was more than courteous, and actually gave us more than thirty minutes. They then instructed the head of the zoning commission to write an ordinance with us for broadcast facilities and scheduled for a vote with city council. After several attempts over six months to obtain cooperation we were told we would never get such a proposal, that they were not going to allow any tall towers. We are now attempting to go back before city council with our own proposal, after approximately a year and a half of futile efforts.

Examples Provided by
WES, Inc.
Broadcast Consultants
El Paso, TX

CERTIFICATE OF SERVICE

I, Mary A. Haller, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., do hereby certify that true copies of the foregoing "Reply Comments" were sent this 1st day of December, 1997, by United States mail, postage prepaid, to the following:

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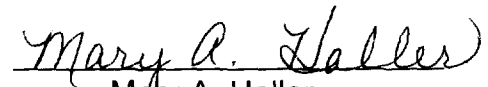
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